No. 17,349

IN THE

United States Court of Appeals

For the Ninth Circuit

SIMONE SCOZZARI,
Appellant,

vs.

GEORGE K. ROSENBERG, District Director Immigration and Naturalization Service, Los Angeles, California,
Appellee.

BRIEF FOR APPELLANT.

G. VERNON BRUMBAUGH,
JACKSON & HERTOGS,
580 Washington Street, San Francisco 11, California,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

Statutes

Texts

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JURISDICTIONAL STATEMENT.

On December 30, 1960 there was filed in the United States District Court for the Southern District of California, Central Division, on behalf of Simone Scozzari, hereinafter referred to as appellant, a declaratory judgment action seeking judicial review of an administrative decision (T. 3). On the 3rd day of February, 1961, the defendant, District Director of the Immigration and Naturalization Service, hereinafter referred to as appellee, by and through his counsel, filed in the United States District Court a motion for summary judgment (T. 7). Findings of

Fact, conclusions of law and judgment adverse to appellant and granting appellee's motion for summary judgment were filed on March 10, 1961 and entered on March 13, 1961 (T. 8-15). Notice of appeal was filed on April 13, 1961 (T. 62).

Jurisdiction of the District Court to entertain the declaratory judgment action is conferred by Section 10 of the Act of June 11, 1946 (Administrative Procedure Act), 60 Stat. 243, 5 U.S.C.A., Sec. 1009. Jurisdiction of the Court of Appeals to review the District Court's final order is conferred by 28 U.S.C.A. 1291 and 1294.

STATUTE INVOLVED.

Title 8, U.S.C.A. 1259.

> "Record of admission for permanent residence in the case of certain aliens who entered the United States prior to June 28, 1940.
>
> A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 1182(a) of this title insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to June 28, 1940;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship."

STATEMENT OF THE CASE.

Appellant is an alien, a native and citizen of Italy, who entered the United States as a stowaway in about 1923. On January 21, 1958, the appellee served upon appellant an order to show cause and notice of hearing. Upon insistence of counsel, the matter was continued by appellee until January 31, 1958, at which time a hearing in deportation proceedings was conducted by subordinate officials of the appellee herein. At the conclusion of that proceeding, it was directed that appellant be deported from the United States. On appeal from said adverse decision, the Board of Immigration Appeals inter alia, under date of July 2, 1958, directed that the case of appellant herein be remanded to the Immigration and Naturalization Service for the purpose of affording appellant an opportunity to file an application to create a record of lawful entry into the United States for permanent residence, pursuant to the provisions of Section 249 of the Immigration and Nationality Act (8 U.S.C.A. 1259). On September 8, 1958, appellant filed, on an appropriate form provided by the Immigration and Naturalization Service, an application to create a

record of admission for permanent residence under Section 249 of the Immigration and Nationality Act (T. 16-19). As part of an alleged hearing conducted in connection therewith, a sworn statement was taken from appellant on December 10, 1958 (T. 21-50). In support of his claim, appellant submitted the certificate of his marriage to a United States citizen (T. 52), the birth record of his wife (T. 51), a letter of Mr. A. M. Alberti (T. 53), and affidavits of two witnesses who appeared at the Los Angeles Office of the Immigration and Naturalization Service (T. 54-56). Said application was denied by the District Director, Immigration and Naturalization Service, Los Angeles, on March 6, 1959 (T. 56-59), and affirmed by the Acting Regional Commissioner, following appeal, on April 1, 1959 (T. 60-62). The declaratory judgment suit was filed in the United States District Court seeking review of the foregoing administrative action.

STATEMENT OF POINTS ON APPEAL.

1. The District Court erred in holding that the appellant was given a fair hearing, as required by the "due process of law" clause of the Fifth Amendment to the Constitution of the United States.

2. The District Court erred in holding that the action of the Immigration and Naturalization Service denying appellant's application to create a record of lawful admission for permanent residence was neither arbitrary nor capricious.

3. The District Court erred in holding that the action of the Immigration and Naturalization Service denying appellant's application to create a record of admission for permanent residence was not an abuse of discretion.

4. The District Court erred in holding that the proceedings conducted by the Immigration and Naturalization Service, relating to the appellant's application to create a record of admission for lawful permanent residence, were fair and were in accordance with law.

5. The District Court erred in holding that the decisions of the Immigration and Naturalization Service denying appellant's application to create a record of admission for permanent residence were based on any reasonable, substantive or probative evidence.

ARGUMENT

This matter is before the Court of Appeals to review the summary judgment of the District Court entered in favor of defendant-appellee and against plaintiff-appellant. In the action below, appellant sought to have all actions and decisions of the appellee pertaining to rejection of appellant's application for adjustment of status under Section 249 of the Immigration and Nationality Act (8 USCA 1259) reviewed and to have said application remanded to the District Director of the Immigration and Naturalization Service for further consideration.

An immigration administrative decision is subject to judicial review where the proceedings have not conformed to the traditional standards of fairness required by the due process of law clause of the Fifth Amendment to the Constitution of the United States. *Japanese Immigrant Case,* 189 U.S. 86, 47 L. Ed. 721, 725, 23 S. Ct. 611; *Vajtauer v. Commissioner of Immigration,* 273 U.S. 103, 71 L. Ed. 560, 563, 47 S. Ct. 302; *Wong Yang Sung v. McGrath,* 339 U.S. 23, 94 L. Ed. 616, 628, 70 S. Ct. 445; *Kwong Hai Chew v. Colding,* 344 U.S. 590, 97 L. Ed. 576, 584, 73 S. Ct. 472. Or where there has been arbitrariness or abuse of discretion by the administrative agency. *Low Wah Suey v. Backus,* 225 U.S. 460, 56 L. Ed. 1165, 1167, 32 S. Ct. 734; *Kwock Jan Fat,* 253 U.S. 464, 64 L. Ed. 1010, 1014, 40 S. Ct. 566; *Carlson v. Landon,* 342 U.S. 524, 96 L. Ed. 547, 558, 72 S. Ct. 525; *Yaris v. Esperdy* 202 F. 2d 109, 112. The same general rule applies to determine whether or not the law has been correctly applied. *Gegiow v. Uhl,* 239 U.S. 3, 60 L. Ed. 114, 118, 36 S. Ct. 2; *Kessler v. Strecker,* 307 U.S. 22, 83 L. Ed. 1083, 1090, 59 S. Ct. 694; *Bridges v. Wixon,* 326 U.S. 135, 89 L. Ed. 2103, 2116, 65 S. Ct. 1443; *Fong Haw Tan v. Phelan,* 333 U.S. 6, 92 L. Ed. 433, 436, 68 S. Ct. 374. Cf. *McGrath v. Kristensen,* 340 U.S. 162, 95 L. Ed. 173, 181, 71 S. Ct. 224.

Such agency action is reviewable under Section 10 of the Administrative Procedure Act (5 USCA 1009). The Administrative Procedure Act authorizes review by the Court and inquiry as to the fairness of the hearing, whether the agency acted capriciously, arbi-

trarily or abused its discretion and as to whether the order of the agency was supported by substantial evidence (5 USCA 1009(e)). *Shaughnessy v. Pedreiro,* 349 U.S. 48, 99 L. Ed. 868, 75 S. Ct. 591; *Brownell v. Tom Wee Shung,* 352 U.S. 180, 1 L. Ed. 2d 225, 77 S. Ct. 252.

The Court, in a proceeding to review under the Administrative Procedure Act, is not permitted to hear the case de novo. The case must be heard on the record. 5 USCA 1009(e). The entire record relating to appellant's application filed under the provisions of Section 249, supra, is fully set forth in the transcript of the record, pages 12-62, inclusive. We have amply defined, by the cases cited, the jurisdiction of the lower Court and this Court and the power of the Courts to protect the rights of all individuals in conformity with the fundamental principles of justice as embraced within the Constitution of this nation. Quaere: Applying those standards to the case at bar, does this record justify judicial intervention?

The issues are so co-mingled that it is impossible to differentiate arguendo—fairness of hearing, arbitrary or capricious action, manifest abuse of discretion and a decision unsupported by substantial evidence. Hence, it is impossible to argue these questions independently.

Even though a judicial precedent directly on point can not be found, it is asserted that by analogy precedent decisions relating to other immigration proceedings are pertinent in determining whether a fair hearing was conducted in the instant matter. It has been

stated that an alien who has entered the United States, even though illegally, may be expelled only after proceedings conforming to the traditional standards of fairness as encompassed in the due process of law clause. *Shaughnessy v. Mezei,* 345 U.S. 206, 97 L. Ed. 956, 73 S. Ct. 625. *U. S. v. Murff* (2 Cir.), 260 F. 2d 610. The latter case involved an alien whose parole into the United States had been revoked without a hearing. However, the Court concluded that the Constitution required a hearing prior to revocation of parole, 260 F. 2d 614.

> "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least current prevailing standards of impartiality."
>
> *Wong Yang Sung v. McGrath,* 339 U.S. 33, 50, 94 L. Ed. 616, 70 S. Ct. 445.

A review of the record here presents a serious question as to whether this form of processing an application for adjustment of status complies with the Administrative Procedure Act and the procedural due process of law requirement. No hearing as such was ever conducted by the Immigration and Naturalization Service. The application was filed, the appellant and two witnesses were interrogated by an Immigrant Inspector and a decision followed.

In *Bridges v. Wixon,* 326 U.S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443, the Supreme Court of the United States, at page 154, stated:

> "Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

It is submitted that this in itself is sufficient to justify reversal of the decision below on the ground that such agency action does not meet the minimum procedural requirements.

The Fifth Amendment to the Constitution of the United States provides that:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law,"

An alien is a person entitled to protection under that due process of law clause. *Galvan v. Press,* 347 U.S. 522, 98 L. Ed. 911, 74 S. Ct. 737. We assert that there was here an invasion of that Constitutional right by the Immigration and Naturalization Service. It is within the province of the Courts to test the validity of oppressive administrative action in a declaratory judgment suit. This action was brought for that specific purpose.

In *Stack v. Boyle,* 342 U.S. 1, 6, 96 L. Ed. 3, 72 S. Ct. 1, Mr. Chief Justice Vinson warned that we should not "inject into our own system of Government the very principles of totalitarianism which Congress was seeking to guard against * * *." This warning is particularly appropriate in the setting of the instant case.

Appellee denied appellant's requested relief, setting forth in his decisions the reasons for such action. The cited disqualifying factors thus relied upon are unsupported and find no basis in the record. The administrative decisions are arbitrary, capricious and unsupported by the evidence. Appellee refers to an alleged meeting at Apalachin, New York, the fact that some

60 individuals representative of the criminal element in the United States attended; that the appellant was accompanied to Apalachin by Frank Desimone, a well known figure among the criminal element in Southern California; that the said Frank Desimone was recently convicted of contempt of Court, and that the appellant admits association with many other persons publicly known to have police records (T. 59). The administrative record fails to show that appellant's association with any or all of the named individuals reflected on his character; there is no evidence as to the present or past activities of the individuals concerned about whom he was questioned. More important, the questions did not go to the period of association, the extent of such association, nor appellant's knowledge concerning the background or records of the parties concerned. There is no evidence of record to establish that Frank Desimone was a well known figure among the criminal element in Southern California, nor that he was recently convicted of contempt of Court, if that at all has any bearing upon this case. Matter of fact, judicial records will show that such contempt of Court citation was reversed and set aside on appeal. The Court of Appeals for the Second Circuit in a recent decision found that there was absolutely no evidence to support a finding that there was a meeting for any criminal purpose at Apalachin, New York in November, 1957.

In *Konigsburg v. State Bar of California,* 353 U.S. 252, 267, 268, 1 L. Ed. 2d 810, 77 S. Ct. 722, the Supreme Court of the United States stated:

> "There was no evidence that he was engaged in or abetted any unlawful or immoral activities—or even that he knew of or supported any actions of this nature. It may be, although there is no evidence before us to that effect, that some members of that party were involved in illegal or disloyal activities but petitioner can not be swept into this group solely on the basis of an alleged membership in that party."

We submit that it is fully in accord with American traditions and numerous judicial rulings to state that this country does not normally establish guilt by association alone. A man is evaluated on the basis of his individual merit, on performance and conduct and not on the basis of those with whom he has been associated in the past. It is not unreasonable to demand a fair and impartial determination—not a decision based upon inference, speculation or conjecture.

In *United States v. Murff*, 2 Cir. 260 F. 2d 610, the Court at page 615 stated:

> "We do say that there must be a hearing which will give assurance that the discretion of the Attorney General shall be exercised against a background of facts fairly contested in the open."

This Court, in *Chernekoff v. United States*, 219 F. 2d 721 at page 723, stated:

> "The fair hearing essential to meet minimum requirements of any accepted notion of due process includes the opportunity to know of adverse evidence and to be heard concerning its truth, rele-

> vancy and significance. Otherwise such a hearing is in violation of the 'concept of ordered liberty', * * *".

Also compare:

> *Takeo Tadano v. Manney,* 9 Cir. 160 F. 2d 665, 667.

In addition to the foregoing, appellee comments upon appellant's relationship with his wife prior to their marriage and to his arrest record. Similar facts relating to premarital relationship were considered and decided adversely to the Immigration and Naturalization Service by the Court of Appeals for the Second Circuit in *Posusta v. United States,* 285 F. 2d 533. The appellant has not been convicted of any offense involving moral turpitude, and he certainly should not be precluded from the relief sought solely upon the basis of his arrest record. Section 249 was remedial legislation designed to afford an alien unlawfully in the United States an opportunity to adjust his status, for humane reasons, to that of a lawful permanent resident. As a general rule, remedial legislation, such as this particular section of law, is to be liberally construed. *Sutherland on Statutory Construction,* Third Edition, Volume II, Section 3302.

It is well recognized that administrative decisions are not binding upon the Courts. However, we believe that the statutory language of the Immigration and Nationality Act and such administrative decisions should be given some weight and consideration in reaching a determination concerning this matter. The Immigration and Naturalization Service has ruled in

published precedent decisions that an alien convicted of a petty offense which does involve moral turpitude is not precluded from establishing good moral character. Matter of M——, 7 I&N Dec. 147; Matter of H——, 6 I&N Dec. 738. Such action is justified under the actual language of Section 4 of the Act of September 3, 1954 (68 Stat. 1145), at which time Congress enacted legislation making such individuals eligible for admission to the United States for permanent residence. The comments of the Service in its decision here establishes a fundamental inequality, prejudicial to appellant. Therefore, it must be concluded that the administrative decision was arbitrary and capricious and that the reasons set forth are unsupported by any evidence whatsoever.

The statute herein, admittedly, grants the Attorney General discretionary powers. By regulation, the Attorney General has delegated such authority to his subordinate administrative officials. However, we believe it now well settled that such authority is subject to judicial review in appropriate cases.

In *Kwock Jan Fat v. White,* 253 U.S. 454, 64 L. Ed. 1010, 40 S. Ct. 566, after discussing the great power of the Secretary of Labor over Chinese immigrants, the Court said:

> "* * * is a power to be administered, not arbitrarily or secretly, but fairly and openly under the restraints and principles of free government applicable where the fundamental rights of men are involved, regardless of their origins or race. It is the province of the Courts, in proceedings

> for review * * * to prevent abuse of this extraordinary power, * * *."

Any delegated executive power is subject to conformance with the due process clause of the Fifth Amendment. *Ex parte Endo,* 323 U.S. 293, 89 L. Ed. 243, 65 S. Ct. 208. Any exercise of discretion must be consistent "with the fundamental principles of justice embraced within the conception of the due process of law." *Tang Tung v. Edsell,* 223 U.S. 673, 56 L. Ed. 606; *Joint Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 95 L. Ed. 817, 71 S. Ct. 624; *Carlson v. Landon,* 342 U.S. 524, 96 L. Ed. 547, 72 S. Ct. 525, rehearing denied 343 U.S. 988.

The discretionary acts of an administrative agency may be reviewed on motions for summary judgment.

Ullah v. Hoy, 9 Cir., 278 F. 2d 194 ,196;

Miyaki v. Robinson, 7 Cir., 257 F. 2d 806, cert. denied 358 U.S. 894;

Aletiou v. Rodgers (D.C.), 254 F. 2d 782.

A review of the record in the instant case reflects a manifest abuse of administrative discretion.

CONCLUSIONS

The administrative decision is not supported by any reasonable, substantial or probative evidence. It is without question an arbitrary and capricious decision in distinct violation of our Constitutional safeguards. It is the inescapable duty of the Courts, as free and responsible moral agents of this country, to use everything within their power to force administrative compliance with the mandates of the Constitution and statutes of the United States.

In *U. S. v. Morton Salt Company,* 338 U.S. 632, 94 L. Ed. 401, 70 S. Ct. 357, the Supreme Court in refering to the Administrative Procedure Act, at page 644, observed that:

> "It created safeguards even narrower than the Constitutional ones, against arbitrary official encroachment on private rights."

Those are not nebulous words and their miscarriage must be jealously guarded against by the Courts in order to prevent persistent erosion of the protection afforded by the Fifth Amendment and the Administrative Procedure Act.

Even though we are not confronted in the instant case with an order of deportation, rejection of the application for adjustment of status is tantamount to banishment of this alien from the United States, and, as the Supreme Court has so succinctly stated on numerous occasions, deportation may result in the loss of all that makes life worth living.

Judicial intervention is appropriate herein in order to prevent abuse of the extraordinary administrative power. Appellant should be accorded a hearing which clearly meets the fundamental principles of justice.

It is respectfully submitted that the decision below should be reversed.

Dated, San Francisco, California,
July 6, 1961.

Respectfully submitted,
G. Vernon Brumbaugh,
Jackson & Hertogs,
By Joseph S. Hertogs,
Attorneys for Appellant.